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No. 95-371

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DOUGLAS COUNTY, OREGON
Petitioner,
v.
BRUCE BABBITT, SECRETARY OF THE INTERIOR
HEADWATERS, INC., AND UMPQUA VALLEY AUDUBON SOCIETY
Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, TEXAS CAPITOL AREA BUILDERS ASSOCIATION, OREGON STATE HOME BUILDERS ASSOCIATION, AND UMPQUA VALLEY HOME BUILDERS ASSOCIATION IN SUPPORT OF PETITIONER

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The National Association of Home Builders of the United States ("NAHB") and the Texas Capitol Area Builders Association ("TxCBA") have received the written consent of the parties to file this brief in support of Petitioner Douglas County, Oregon, and have filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The NAHB represents more than 180,000 builders and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.[1]

The TxCBA is a not-for-profit corporation organized under the laws of the State of Texas. TxCBA is an NAHB affiliate, representing over 700 members employing in excess of 8,000 people regularly conducting business related to the housing industry in the Austin, Texas area.[2]

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[1] The NAHB has been before this Court either as an *amicus curiae* in support of, or as of counsel on behalf of, the property owner in prior cases involving government land use decisions. *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The NAHB brief was cited approvingly in this Court's *Nollan* opinion, 483 U.S. at 840.

[2] NAHB and TxCBA have filed an action against Secretary Babbitt — *NAHB v. Babbitt*, Civ. No. 1:95CV01552 JLG (D.D.C. 1995) —challenging

(footnote continues)

The Oregon State Home Builders Association ("Oregon HBA") is a for-profit corporation organized under the laws of the State of Oregon. The Oregon HBA is an NAHB affiliate, representing over 4,814 members organized in 17 local organizations throughout Oregon.

The Umpqua Valley Home Builders Association ("Umpqua Valley HBA") is a not-for-profit corporation organized under the laws of the State of Oregon. The Umpqua Valley HBA is an NAHB affiliate, representing 156 members doing business in Douglas County, Oregon — the geographic subject of this action. The ultimate resolution of this action, while important to all NAHB members, is of particular importance to these builders.

The Building Industry Amici's interests lie in seeing that the implementation of laws concerning or affecting the use of private property remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with government actions which impinge on constitutional guarantees.[3] The Building Industry Amici have a particular interest in the administration of federal environmental statutes, such as the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370d and the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, given the far-reaching impact that these laws have upon private land use and land-use regulation.

(footnote continued)

the Interior Department's failure to comply with the National Environmental Policy Act in its listing of the Golden-cheeked Warbler as endangered. This action involves issues similar to those raised by petitioner in this case.

[3] As Justice Brandeis insightfully admonished:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

The Building Industry Amici believe that this brief will assist the Court in making its decision whether to grant review of the issues presented in the Petition. The Building Industry Amici's concerns are much broader than those of Petitioner Douglas County, Oregon, since its members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land. The Building Industry Amici's brief addresses the broader public policy reasons why review should be granted.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Court should grant Petitioner's writ because the lower court has decided a question of national importance in a way that conflicts with this Court's precedents. The Court has made it clear that one of the fundamental purposes of the NEPA is to provide to decisionmakers and the public at large information regarding the environmental impacts of federal decisions. The lower court's decision frustrates this purpose even though there is no necessity for doing so, and contravenes the mandate of this Court that the NEPA's requirements may be dispensed with only where another law makes compliance impossible.

Compliance with the NEPA in designating critical habitat is of great importance. The Secretary has already designated critical habitat for dozens of species covering millions of acres and hundreds of river miles; hundreds of other species still await designation of critical habitat. These designations can have significant environmental impacts. Only through compliance with the NEPA will these impacts be fully explored and disclosed to the public as intended by Congress.

REASONS FOR GRANTING THE WRIT

A. The NEPA Process Serves As A Vital Information Resource

Through the NEPA, federal agencies historically have ensured that they possess sufficient information concerning the environmental impacts of a proposed federal action to make an informed judgment about whether to proceed with the action. Yet federal agencies are not the sole focus for making this information available through the NEPA. The NEPA's policies are fully achieved only if the President, the Congress, state and local agencies, and the general public also have the opportunity to assess the information that is collected by federal agencies concerning the environmental consequences of a government action. These policies which include, *inter alia*:

1) "To declare a national policy which will *encourage* productive and enjoyable harmony between man and his environment;"

2) "[T]o *promote* efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man;" and,

3) "[T]o *enrich the understanding* of the ecological systems and natural resources important to the Nation."

42 U.S.C. § 4321 (emphasis added). These goals are realized "through a set of 'action-forcing' procedures that require that agencies take a "hard look' at environmental consequences,' . . . and that provide for broad dissemination of relevant environmental information." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). Thus, one of the clear benefits derived from the proper application of the NEPA is the availability of information regarding the environmental consequences of government actions.

By evaluation, investigation, and assessment, along with the dissemination of information gathered through the NEPA

process, federal agencies ensure not only that they possess information sufficient to make an environmentally sound decision, but also that the President, Congress, and the general public possess this same information. These other parties — through their possession and understanding of this information — not only can evaluate federal agency decisions, but they can also act in their own capacities based upon this information.

Absent the dissemination of this information, it is not possible to *encourage* productive and enjoyable harmony, or to *promote* efforts preventing environmental damage, or certainly to *enrich the understanding* of the Nation's resources. Moreover, the withholding of information frustrates

> the continuing policy of the Federal Government, in cooperation with state and local governments, and other concerned public and private organizations, to use all practicable means . . . to create and maintain conditions under which man and nature can exist in productive harmony . . .

42 U.S.C. § 4331 (a). Indeed, "[t]he Congress recognizes . . . that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331 (c).

While common sense alone dictates that the widespread dissemination of information is critical to furthering the NEPA's goals, Congress acted to ensure the dissemination of information by codifying this requirement. Section 4332 (c) clearly provides that Environmental Impact Statements ("EIS") prepared pursuant to the NEPA:

> *shall* be made available to the President, the Council on Environmental Quality and to the public . . . and *shall* accompany the proposal through the existing agency review processes[.]

42 U.S.C. § 4332 (emphasis added). Thus, federal agencies are mandated by Congress to disseminate copies of an EIS prepared

pursuant to the NEPA. The "[p]ublication of an EIS . . . serves a larger informational role. It gives the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process[.]' " *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349 (quoting *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983)).

The Ninth Circuit's decision below frustrates the purposes of the NEPA by halting the flow of information in the context of the ESA critical habitat designation. As argued above, this Court has clearly recognized that the NEPA goes beyond providing information to the federal agency during the rulemaking process, since it "also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349. Furthermore, as argued below, the enforcement of the NEPA with respect to the designation of critical habitat under the ESA is required in furtherance of Congressional directive and policy.

B. The NEPA Applies To The Designation Of Critical Habitat Under The Endangered Species Act

1. There Is No Conflict Between The NEPA And The ESA

This Court has interpreted the NEPA provision directing the application of that act "to the fullest extent possible" to be a "deliberate command." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976). "[E]ach agency of the Federal Government *shall* comply with the directives set out in (s 102(2)) *unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible . . . " *Flint Ridge Dev. Co.*, 426 U.S. at 787-788 (quoting 115 Cong. Rec. 39703 (1969) (House conferees); 115 Cong. Rec. 40418 (Senate conferees)) (other citation omitted).

Absent a "*clear and unavoidable conflict* in *statutory authority*", the NEPA is applicable to all major federal actions. *Flint Ridge Dev. Co.*, 426 U.S. at 788; *Metropolitan Edison Co. v. U.S. Nuclear Regulatory Comm'n*, 460 U.S. 766, 772 (1983) ("[W]here an agency action significantly affects the quality of the human environment, the agency must evaluate the 'environmental impact' and any unavoidable adverse environmental effects of its proposal"); *Robertson*, 490 U.S. at 350 ("NEPA itself does not mandate particular results, but simply prescribes the necessary process"); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1976) ("There is no support in either the statute or the cases for implying a 'national defense' exemption from NEPA"); *Izaak Walton League v. Marsh*, 655 F.2d 346, 367 (D.C. Cir. 1981) (NEPA applicable absent clear conflict).

There is no "clear and unavoidable conflict" between the NEPA and the Endangered Species Act, nor is there any statutory exemption from the NEPA in the ESA.[4] The NEPA — by its clear statutory language — applies to the designation of critical habitat pursuant to the ESA.[5] Thus, the lower court's decision flies in the face of this Court's precedents.

2. The NEPA's Application To The Designation Of Critical Habitat Is Important To Private Property Owners

Critical habitat designations are made by the Secretary of Interior "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact," of such designation. 16 U.S.C. § 1533 (b)(2). If the benefits of excluding an area from a critical habitat designation outweigh the benefits of its inclusion, the

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[4] On other occasions, Congress has affirmatively acted to create statutory exemptions from the NEPA. That it has not done so with the ESA is clear evidence that it intended the NEPA process to apply to actions taken pursuant to the ESA.

[5] Secretary Babbitt does not claim that the designation of critical habitat is not a major federal action affecting the human environment.

Secretary of the Interior may exclude the area from a critical habitat designation.[6]

Economic and other relevant factors constitute information typically included in a NEPA EIS, which is designed to analyze a wide range of impacts on the human environment.[7] Mere statements, however, in a preamble to a critical habitat designation regulation do not provide solid evidence that such factors were given the requisite "hard look" by the Secretary. *See Douglas County v. Lujan*, 810 F. Supp. 1470, 1480 (D. Or. 1992). The preparation of an EIS regarding the designation of critical habitat ensures a comprehensive and systematic examination of all relevant impacts while also permitting the President, the Congress, state and local agencies, as well as the general public to evaluate the Secretary's decision in the context of such factors.

The general public's access to this information is most important. As of May 1993, 90% of the 781 species listed as endangered or threatened under the ESA inhabit non-federal lands. Of these listed species, 517 have over 60% of their total habitat on non-federal lands.[8]

The habitat for these species and the 184 species that have been listed as endangered or threatened since May 1993 covers tens of millions of acres, much of it private property, and hundreds, if not thousands, of river miles. The Secretary has already designated critical habitat for some 115 species covering millions

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[6] *Id.* If the exclusion of an area from a critical habitat designation will lead to the extinction of a species, the Secretary may not exclude that area from the designation on economic or other grounds. 16 U.S.C. § 1533 (b)(2).

[7] The Ninth Circuit provides no basis for its assertion that the Secretary cannot take into account a wide variety of environmental impacts when designating critical habitat. The statute requires consideration of "relevant impacts" without limiting in any way the scope of impacts that may be relevant. It would be odd to allow the Secretary to decline to designate an area of critical habitat because of economic impacts, but not because of other environmental impacts.

[8] *See* General Accounting Office, Endangered Species Act: Information on Species Protection on Non-Federal Lands, 4-5 (Dec. 1994).

of acres.[9] The designation of such critical habitat imposes on all federal agencies an obligation to ensure that their actions will not result in the adverse modification of that critical habitat. 16 U.S.C. §1536(a)(2). This obligation extends to all types of federal actions, including actions relating to private property, *e.g.*, federal funding for state, local, and private projects; issuance of federal permits to discharge dredged or fill material into wetlands and other waters of the United States pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344; issuance of other permits under the Clean Water Act, 33 U.S.C. §§ 1251-1387; and the Clean Air Act, 42 U.S.C. §§ 7401-7671q; and, the provision of federal flood insurance. These prohibitions are likely to be extended to tens of millions of additional acres in the future as the Secretary designates critical habitat for some of the 800 endangered and threatened species currently lacking critical habitat designations or some of the more than 3000 species that are currently candidates for listing under the ESA.[10]

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[9] For example, the Secretary has designated approximately 6.9 million acres as critical habitat for the Northern spotted owl in this case; 4.6 million acres for the Mexican spotted owl, 60 *Fed. Reg.* 29914 (1995); 6.4 million acres for the desert tortoise, 59 *Fed. Reg.* 5827 (1994); and 6.3 million acres for the gray wolf, 50 C.F.R. § 17.95 (a). In addition, the Secretary has designated 1,980 miles of the Colorado River and its tributaries as critical habitat for four fish species, 59 *Fed. Reg.* 13374 (1994); and has designated the entire Sacramento-San Joaquin River delta — which lies at the heart of the water system serving much of the State of California — as critical habitat for the delta smelt, 59 *Fed. Reg.* 65256 (1994).

[10] For instance, the Secretary has proposed to designate 4.45 million acres in three states as critical habitat for the marbled murrelet, 60 *Fed. Reg.* 40892 (1995), 860,000 acres of lake, stream and shoreline for the Lost River sucker and the shortnose sucker, 60 *Fed. Reg.* 5893 (1995), and 20,000 acres on 210 miles of coastline (10% of the California, Oregon and Washington coastline) for the Western snowy plover, 60 *Fed. Reg.*25882 (1995). The Secretary at one time considered a proposal to designate portions of 33 Texas counties as critical habitat for the Golden-cheeked Warbler. Scott Harper, *Endangered: Species or Rights*, Houston Post, August 28, 1994 at A1. Other newly listed and candidate species also have extensive ranges. The Southwestern willow flycatcher is thought to inhabit

(footnote continues)

The designation of critical habitat, particularly on this scale, can have significant environmental impacts of the type that would typically be discussed in an EIS. The district court noted the environmental impacts that could reasonably be expected to result from the designation of critical habitat for the Northern Spotted Owl including impacts on the economy, employment, public and social services.[11] Other designations can be expected to have similar effects. For instance, while designation of critical habitat for a species may tend to preserve the designated habitat, the designation will at the same time push development and other human activities into other nearby areas which will undoubtedly serve as habitat for other species.

Clearly, given these numbers, the impact of critical habitat designation has a massive impact on the human environment. If the federal government is going to initiate an action such as the designation of private land as critical habitat for an endangered species, which brings a host of restrictions and prohibitions upon the use of land, it is not unreasonable for those impacted by the decision to have full access to information concerning the extent of those impacts. Indeed, "the EIS serves the function of offering [ ][property owners and builders] adequate notice of the expected consequences [of an agency decision] and the opportunity to plan and implement corrective measures in a timely manner." *Robertson*, 490 U.S. 332, 350 (1989). Absent this information, builders are operating in the dark — or at least in a murky half-light — unable to either fully participate in the rulemaking process or to plan for the eventual and probable impacts of the critical habitat designation.

(footnote continued)

portions of seven states. 60 *Fed. Reg.* 10694 (1995). The Northern goshawk, a species which the Secretary has determined may warrant listing as endangered or threatened, is found throughout much of the conterminous United States. *See* 59 *Fed. Reg.* 58982, 58990 (1994) (goshawk historically has nested in 26 states and regularly visited 19 others).

[11] These impacts are of the type that may be considered in an EIS. *See* 40 C.F.R. § 1508.8.

CONCLUSION

Therefore, for the reasons stated above, and in the Petition for Writ of Certiorari, the NAHB, TxCBA, Oregon State HBA, and Umpqua Valley HBA pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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